IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN

AT JODHPUR

**J U D G M E N T**

Harchand Vs. State of Rajasthan

**S.B.CRIMINAL APPEAL NO.246/1988**
against the judgment dt.20.6.1988
passed by the Sessions Judge, Bikaner,
in Sessions Case No.28/1986.

Date of Judgment: July 03, 2007

P R E S E N T

**HON'BLE MR.JUSTICE DEO NARAYAN THANVI**

Mr.S.G.Ojha )
Mr.Pawan Ojha) for appellant.

Mr.V.R.Mehta, Public Prosecutor.

BY THE COURT:

1. This appeal is directed against the judgment and order passed by the learned Sessions Judge, Bikaner on 20.6.1988, whereby he convicted accused appellant Harchand under Section 376 IPC and sentenced him to five years' rigorous imprisonment and to pay a fine of Rs.2000/- and in default, to further undergo three months' R.I.

2. The facts leading to this appeal are that on 5.1.1986 in the morning between 10.00 and 11.00 AM, a minor girl Radhki aged 8-9 years was going for getting eased out with her younger sisters viz; Santli and Mali, where accused Harchand alias Chandiya caught hold Radhki and committed rape on her behind the fields of Hema Ram and Hanuman. Both younger sisters Santli and Mali went at the residence and informed of the incident to their mother and grand father, who went to the spot and on seeing them, the accused Harchand ran away. The information of this incident was lodged on the very day at 1.00 P.M. at Police Chowky Jasrasar before the S.H.O. Nichhattar Singh and prosecutrix was medically examined by the doctor on the same day at 6.30 PM. After investigation, the chargesheet was submitted against accused Harchand under Section 376 IPC to which he pleaded not guilty. The prosecution examined 11 witnesses. The statement of accused Harchand was recorded under Section 313 CrPC and he produced Sampatlal Jain (DW 1) and Budha Ram (DW 2) in his defence. After hearing the arguments, learned Sessions Judge awarded the aforesaid sentence keeping in view the age of the accused to be between 16 and 18 years.

3. I have heard the arguments of the learned counsel for the appellant and the learned Public Prosecutor.

4. While assailing the judgment of the learned trial Judge, it has been contended by the learned counsel for the appellant that the evidence of a child witness of about 8 years, cannot be relied upon because the certificate as required under the law before recording statement of child witness has not been appended in the statement of prosecutrix Radhki (PW 1) by the recording trial Judge. He has also submitted that both the sisters of Radhki, who were accompanying her before the incident, have not been examined. The evidence of Radhki's mother and grand father is not reliable. According to him, there is no evidence of sexual intercourse from the medical examination and the necessary underwear etc., which were said to be on the spot, have not been produced and whatever statements have been recorded during the trial, are contradictory and uncorroborated. He has also submitted that the F.I.R. has been registered at the later stage but the wrong time has been recorded.

5. Learned Public Prosecutor has supported the judgment of the learned trial court and has vehemently argued that the accused Harchand should have been punished for a minimum period of seven years as prescribed under the law, instead of five years.

6. The fact that the age of prosecutrix was between 8-9 years and that of accused between 16-18 years at the relevant time, is not disputed. The question to be seen is as to whether the certificate regarding understanding the sensitivity of oath by a child witness is necessary or not. In this regard, Section 118 of the Evidence Act is relevant, which reads as under:

> "**S.118.** All persons shall be competent to testify unless the Court considers that they are prevented from understanding the questions put to them, or from giving rational answers to those questions, by tender years, extreme old age, disease, whether of body or mind, or any other cause of the same kind."

7. This Section deals with the competency of a witness to testify. By plain reading of the Section, it appears that every witness is a competent one to testify in Court, unless the Court considers that they are prevented from understanding the questions put to them by their tender or old age, disease or any other cause of the same kind. The basic idea while enacting this Section is that the witness must be able to understand the questions put to him by giving rational answers. The law nowhere says that a judge is required to put a certificate that the witness understands the sensitivity of oath. Normally, every statement is recorded in the court on oath but this Section is exception to the general rule. There is no rule as to what should

be the age of a child witness. Normally, it is considered to be below 12 to 14 years and when such a witness is produced before the court, the court may make preliminary enquiry with regard to the fact as to whether he is able to give rational answers or not. In the present case, the learned trial Judge has already put preliminary questions to prosecutrix Mst.Radhki (PW 1) before her statement was recorded and after putting such preliminary questions as to temple and God, learned trial Judge was of the opinion that the witness is unable to understand the sensitivity of the oath. Hence, the oath was not administered to her and without administering the oath, he recorded her statement. If her statements are read with regard to the incident as has been narrated in the F.I.R. Ex.P.10 & Ex.P.11, she has stated that the accused Harchand resident of village Jasrasar caught hold of her, while she was going with her sisters and committed rape on her and ran away, when her mother and grand father came on the spot. Her mother Rewti alias Kamli (PW 2) and grand father Shera Ram (PW 3) have stated in their statements that they saw accused Harchand running away from the sand dunes at a distance of 5-6 steps as per the statement of Rewti (PW 2) and 50 steps as per the statement of Shera Ram (PW 3). They also noticed blood at the urinal point of Radhki and her mouth was fastened with some cloth. In this way, the statement of Radhki (PW 1) which is corroborated by the

statements of Rewti (PW 2) and Shera Ram (PW 3) regarding committing rape by accused Harchand, leads to the conclusion that Radhki was able to give rational answers to the questions and the learned trial Judge while relying upon the statement of Radhki corroborated by the statements of Rewti (PW 2) and Shera Ram (PW 3), has rightly come to the conclusion that the rape was committed by accused Harchand on Radhki.

8. The identity of accused Harchand is also undisputed because he hails from the same place and is known to the prosecution witnesses. The evidence of prosecutrix Mst.Radhki is also supported by the testimony of Dr.Omprakash Somani (PW 8), who has stated that underwear of Mst.Radhki was stained with fresh blood and there was a severe pain in the perineum and according to his opinion, the girl was raped. He has further stated that as per his report Ex.P.13, accused Harchand was physically fit.

9. The next contention of the learned counsel for the appellant that the case of the prosecution is fatal because of non-examination of both the sisters of prosecutrix Radhki, who accompanied her, is also devoid of force because both the sisters are even younger to prosecutrix Radhki, who was 8 years of age at the relevant time, specially when they were not the witnesses

of rape. They simply informed their parents because both the girls were forced to leave the place of occurrence at the instance of accused Harchand and they had informed their mother and grand father accordingly.

10. In this way, commission of rape on a minor girl, aged 8-9 years, by an accused, who is also said to be minor between the age of 16 & 18 years, has been well established and the sentence of five years, instead of seven years as required under the law, awarded by the trial Court keeping in view of the age of the accused at the time of incident, cannot be said to be a lenient one, as the learned trial Judge has assigned adequate and special reasons with regard to age of accused, who was minor at the time of incident. Therefore, there seems no reason to interfere with the finding of the learned trial court with regard to guilt of the accused Harchand under Section 376 IPC and the sentence awarded.

11. Consequently, this appeal is dismissed and the judgment & sentence dated 20.6.1988 passed by the learned Sessions Judge, Bikaner, is confirmed. Since the accused Harchand is on

bail, let a warrant of arrest be issued by the trial Judge against him for serving out remaining part of the sentence.

**(DEO NARAYAN THANVI), J.**

RANKAWAT JK, PS